No. 49179-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JANET L. GLEASON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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B. Did the trial court err when it considered extrajudicial information when determining Gleason's request for a prison based DOSA sentence?

II. STATEMENT OF THE CASE

CASE No. 15-1-00537-21.

On September 30, 2015 Janet Gleason was charged by the Lewis County Prosecutor's Office with one count of Possession of Methamphetamine with Intent to Deliver. CP 47-48. The allegation was that between May and August 2015 Gleason was under investigation for selling methamphetamine. CP 51. Ultimately the police stopped Gleason in her vehicle due to her driving on a suspended license. *Id.* Gleason admitted she was on the way to sell methamphetamine when the police stopped her. CP 52. A search of Gleason's vehicle yielded methamphetamine, cash, packaging material, and a scale. *Id.*

On October 5, 2015 the State amended the information to include Counts I and II: Possession of Methamphetamine with the Intent to Deliver, and Count III: Possession of Heroin. CP 53-55. There was an amended probable cause statement also filed, with

additional information regarding an April 10, 2015 encounter the police had with Gleason at the King Oscar Motel. CP 57-59. Ultimately, at that encounter Gleason was found to be in possession of 60 grams of methamphetamine, heroin, scales, and packaging materials. CP 59.27

Also filed on October 5, 2015 was an affidavit of Jonathan Meyer, the Elected Prosecutor of Lewis County. CP 60. Mr. Meyer's affidavit stated he was disqualified from Gleason's case because he believed himself to be a victim of a crime committed by Gleason. *Id.* The affidavit states that Mr. Meyer would not participate in the case as the Prosecuting Attorney and would not discuss the matter with any of the staff of the Lewis County Prosecuting Attorney's Office. *Id.*

CASE No. 15-1-00594-21.

On October 29, 2015 Gleason was charged with Count I: Residential Burglary, Count II: Trafficking in Stolen Property in the Frist Degree, and Count III: Malicious Mischief in the Second Degree. CP 117-18. The allegation was that Gleason and an accomplice burglarized the home of Elected Prosecutor Jonathan Meyer. CP 121-23. Gleason told the accomplice, Robert Collins, she burgled Mr. Meyer's home to get back at him for prosecuting Gleason's son. CP 122. The police confirmed Mr. Meyer had prosecuted Gleason's son.

Id. The front door jamb of the house was damaged, jewelry and other personal items were stolen from the home. CP 121-22.

MARCH 30, 2016 PLEA HEARING.

On March 30, 2016 there was a plea hearing for the Possession of Methamphetamine with Intent to Deliver case and the Residential Burglary case. See RP (3/30/16). For 15-1-00537-21 Gleason pleaded guilty to one count of Possession of Methamphetamine with Intent to Deliver. RP (3/30/16) 2, 5-6; CP 67-77. The State's recommendation was 84 months in prison with an agreement that a Drug Offender Sentencing Alternative (DOSA) was okay. CP 70.

On the 15-1-00594-21 case Gleason pleaded guilty as charged to Count I: Residential Burglary, Count II: Trafficking in Stolen Property in the First Degree, and Count III: Malicious Mischief in the Second Degree. RP (3/30/16) 2, 5-7; CP 128-39. The State's recommendation was for 84 months on Counts I and II, 23 months on Count III, DOSA was okay if Gleason cooperated, otherwise the State would recommend a top of the range sentence. CP 131. Gleason's attorney indicated she would be requesting a DOSA and the motion and order for the evaluation would be submitted to the court the following week. RP (3/3016) 8.

CASE No. 16-1-00251-21.

Gleason was charged with one count of Bail Jumping when she failed to appear for her sentencing hearing on May 11, 2016. CP 1-3. Gleason opted to plead guilty to the Bail Jumping charge on the same date, June 15, 2016, she was sentenced on the matters she previously pleaded guilty to on March 30, 2016. See RP (6/15/16); CP 19-30.

JUNE 15, 2016 PLEA AND SENTENCING HEARING.

On June 15, 2016 Gleason appeared for a hearing to plead guilty to her new Bail Jumping charge and be sentenced on the other two cases. See RP (6/15/16). Gleason first pleaded guilty to the Bail Jumping charge. *Id.* at 3-8; CP 19-30. Gleason was then sentenced on all cause numbers, 15-1-00594-21, 15-1-00537-21, and 16-1-00521-21. RP (6/15/16) 8-22.

In the 15-1-00594-21 case, Mr. McClain represented the State as a special prosecutor. *Id.* at 8. Mr. McClain noted how Gleason had agreed to cooperate with law enforcement for an agreement that the State would support Gleason's request for a DOSA. *Id.* Ultimately, Gleason did not adequately assist law enforcement and the State recommended an 84 month sentence on Counts I and II, Residential Burglary and Trafficking in Stolen Property in the Second Degree,

and a 29 month sentence on Count III, Malicious Mischief in the Second Degree. *Id.* at 8-9.

The State requested 84 months for the Possession of Methamphetamine with Intent to Deliver in 15-1-00537-21. *Id.* at 10. The State then requested 51 months in 16-1-251-21, the Bail Jumping case, to run consecutive to the other two matters. *Id.*

Gleason requested all time to run concurrent she be sentenced to a prison based DOSA. *Id.* at 11. Gleason's attorney noted Gleason had a DOSA evaluation and assumed the trial court had an opportunity to read the evaluation. *Id.* Gleason's counsel noted how the evaluation stated she has a serious drug problem. *Id.* Gleason's attorney argued Gleason would benefit from treatment. *Id.*

The victim of the Residential Burglary, Mr. Meyer, spoke at Gleason's sentencing. *Id.* at 16-17. Mr. Meyer stated how his teenage daughter was the person to come home and find the front door kicked in. *Id.* at 16. Mr. Meyer said he was aware people would be unhappy with him because of the job he did, as a prosecutor, but never did he think they would violate the sanctity of his home. *Id.* Mr. Meyer believed this was an attack on himself, his family, and the entire system. *Id.* Mr. Meyer also noted Gleason still refused to take responsibility for her actions. *Id.* at 17. Mr. Meyer asked that Gleason

not be rewarded with a DOSA. *Id.* Mr. Meyer stated, "This was revenge, pure and simple." *Id.*

The trial court told the parties it had read the DOSA evaluation, the risk assessment, and was not inclined to grant Gleason's request for a DOSA. *Id.* at 18. The trial court stated Gleason's case did not warrant the imposition of a DOSA. *Id.* The trial court said Gleason's case was in another category due to the residential burglary committed to exact revenge, and that circumstance, in and of itself, is enough of a reason to disqualify Gleason. *Id.* at 18-19. The trial court also discussed the issue with consecutive sentences. *Id.* at 19. The trial court then imposed the sentences as requested by the State. *Id.* at 19-20; CP 31-41, 99-110, 143-56. Gleason timely appeals. CP 111, 157.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE CONCEDES THAT THE TRIAL COURT ERRED WHEN IT SENTENCED GLEASON TO CONSECUTIVE SENTENCES WITHOUT THE IMPOSITION OF AN EXCEPTIONAL SENTENCE.

The State concedes Gleason was improperly sentenced to a consecutive sentence on the Bail Jumping charge. Absent the finding of an exceptional sentence the trial court should have sentenced all

of Gleason's cases and charges sentenced on the same day concurrently. Therefore, the Court should remand Gleason's cases back to the trial court for a resentencing hearing.

1. Standard Of Review.

Statutory interpretation is reviewed by this Court under a de novo standard. *In re Post-Sentence Review of Combs*, 176 Wn. App. 112, 116, 308 P.3d 763 (2013).

An appellate court will review a standard range sentence if the trial court has rendered its sentence by relying on an impermissible ground for denying an exceptional sentence below the standard range or when the trial court has refused to exercise its discretion. *State v. McGill*, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002).

It is an abuse of discretion when the trial court bases its decision on untenable reasons or grounds or the decision is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). "A decision is based on untenable grounds or for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 656, 71 P.3d 638 (2003) (internal quotations and citations omitted).

2. Current Offenses Shall Be Served Concurrently.

The Sentencing Reform Act prescribes the authority sentencing courts are awarded in Washington State when sentencing persons convicted of felony offenses. *In re Combs*, 176 Wn. App. at 117. "The SRA limits the trial court's sentencing authority to that expressly found in the statutes." *Id.*

This Court gives the plain meaning of the statute the effect of an expression of the intent of the legislature when that meaning is plain on the statute's face. *Id.*

> We determine the statute's plain meaning from the ordinary meaning of its language, as well as from the statute's general context, related provisions, and the statutory scheme as a whole. Absent specialized statutory definition, we give a term its plain and ordinary meaning ascertained from a standard dictionary. We interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous.

Id. (internal citations omitted).

The statute in the SRA that governs concurrent and consecutive time is RCW 9.94A.589. The relevant portion of the statute is:

> Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That

> if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

9.94A.589(1)(a). Current offenses are defined as "[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed." RCW 9.94A.525(1)

3. The State Concedes That Absent An Exceptional Sentence, Gleason Was Improperly Sentenced To A Consecutive Sentence On Her Bail Jumping Conviction.

Gleason argues the trial court abused its discretion by improperly running her Bail Jumping conviction consecutive to her other convictions. Brief of Appellant 14-16. The State concedes the trial court erred when it ran the Bail Jumping conviction in cause number 16-1-00251-21 consecutive to the other sentences entered on June 15, 2016 without finding an exceptional sentence was warranted and making the proper findings. Therefore, this Court should remand Gleason's case back to the trial court for resentencing.

The judge sentenced Gleason to a consecutive sentence on the Bail Jumping case, 16-1-00251-21, finding all circumstances of the case warranted Gleason to receive such a sentence and reject her request for a DOSA. RP (6/15/16) 19; CP 35. All of Gleason's offenses were sentenced on the same day, they are current offenses, and shall run concurrent, absent an exceptional sentence. RCW 9.94A.589. While Gleason's offender score was 10, and the judge could have made a finding that Gleason deserved an exceptional sentence due to her committing multiple current offenses, which results in some of those offenses going unpunished, such as her bail jumping charge, that did not occur. See RCW 9.94A.535(2)(c); CP16-17. Therefore, Gleason was improperly sentenced to a consecutive sentence on the Bail Jumping cause number and these cases must be remanded for resentencing.

Even though Gleason requires resentencing on this issue, contrary to Gleason's assertion, her case does not require this Court to remand to a different judge for the resentencing hearing. Reassignment is appropriate only in limited circumstances. *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017).

> [E]ven where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally not available as an appellate remedy if an appellate opinion offers sufficient guidance to

> effectively limit trial court discretion on remand. *Id*. Erroneous rulings generally are properly grounds for appeal, not for recusal. *Id*. at 388. But where review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge.

Solis-Diaz, 187 Wn.2d at 540. There is no such showing of prejudment, or that the judge's impartiality might be reasonably questioned in Gleason's case. This case will, as argued below, only be remanded for resentencing regarding the consecutive sentences. The denial of the DOSA request will stand. There is no cause to remand this matter to a different judge upon resentencing.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED GLEASON'S REQUEST FOR A DOSA.

Gleason argues the trial court erred when it denied her request for a DOSA sentence. Brief of Appellant 9-14. Gleason bases this argument in part by stating the trial court violated the real facts doctrine when it took extrajudicial facts into account when deciding whether to grant or deny the request for a DOSA. *Id.* at 8-14. Gleason's argument is without merit. The trial court did not abuse its discretion when it denied her request for a DOSA. Gleason's case must be remanded solely on the issue regarding the consecutive sentences only.

1. Standard Of Review.

A DOSA sentence is a form of a standard range sentence. *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 1214 (2003). A sentence within the standard range is generally not appealable. RCW 9.94A.585(1). The trial court's decision on whether or not to grant a DOSA is ordinarily unreviewable. *Bramme,* 115 Wn. App. at 850. However, denial of a DOSA may be reviewed for abuse of discretion or legal error. *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Review is limited to circumstances where the court either relied upon an impermissible basis for its refusal, such as religion, race or gender; or the court refused to exercise its discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

2. The Trial Court Properly Considered All The Information Presented At Sentencing When Determining Whether To Grant Gleason's Request For A Prison Based DOSA.

Although a defendant is entitled to request at sentencing that the trial court consider a sentence below the standard range, the defendant is not entitled to have such a sentence implemented. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). If a defendant is entitled to request a sentence below the standard range one could conclude that a defendant similarly has the right to request

a sentencing alternative, such as a DOSA. A sentencing judge is vested with broad discretion in deciding whether or not to grant a defendant's request for a DOSA. *Grayson*, 154 Wn.2d at 342. A categorical refusal to consider a sentencing alternative which is authorized by statute is a failure to exercise discretion. *Id.*

Gleason argues the trial court abused its discretion in denying her request for a prison based DOSA because it violated the real facts doctrine when it relied on the victim's statement at sentencing as part of its reasoning for denying the request. Brief of Appellant 11-14. Gleason apparently also objects to information contained within the DOSA Risk Assessment. *Id.* at 12. Gleason stretches this argument one further by arguing that if the burglary really was for the purpose of revenge the State should have filed charges of intimidating a public servant, or as an aggravating factor. *Id.* at 12-13; RCW 9A.76.180. These later arguments are red herrings. The State is not required to file charges or aggravating factors. RCW 9.94A.401; RCW 9.94A.411. The trial court properly considered the facts that were presented to it during the sentencing and did not abuse its discretion when it denied the DOSA request.

A trial court is permitted to rely on extrajudicial information at a sentencing hearing under certain circumstances. RCW

9.94A.530(2); *Grayson*, 154 Wn.2d at 338-39. "Constitutional and statutory procedures protect defendants from being sentenced on the basis of untested facts." *Id.* at 338, *citing generally Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004); RCW 9.94A 530(2). Yet, a trial court may rely on information presented at a sentencing hearing, if the facts are proved, acknowledged or admitted. *Id.* at 339. These facts may be used by the trial court when it determines what sentence is appropriate, including whether to grant a defendant's request for a DOSA. *Id.* "Acknowledged facts include all those facts presented or considered during sentencing that are not objected to by the parties." *Id.* (internal quotations and citations omitted).

In *State v. Jones,* the trial court permissibly considered a number of factors, such as whether Jones would benefit from treatment, his criminal history, the fact Jones was facing pending charges, and whether the DOSA would serve the community or Jones. *State v. Jones*, 171 Wn. App. 52, 55-56, 286 P.3d 83 (2012).

The Supreme Court similarly in *Grayson* discusses how beyond the categorical denial there was more available to the trial court to determine, and deny Grayson's request for a DOSA sentence. *Grayson*, 154 Wn.2d at 341-43. The Supreme Court noted

there had been a DOSA report (finding Grayson eligible), the prosecutor had argued several reasons why Grayson was not a good candidate for a DOSA, and these could easily have been part of the reasoning of the trial court to determine Grayson should not receive a DOSA. *Id.* at 336, 342-43.

As exemplified by the law and the two cases above, extrajudicial facts, when not objected to, are permissible for consideration by the trial court in determining whether to grant a DOSA request. Gleason's attorney is the one who asked the trial court to consider the DOSA evaluation. RP (6/15/16) 12. Gleason cannot now argue it was improper for the trial court to consider the report. *State v. Fort*, 190 Wn. App. 202, 227, 360 P.3d 820 (2015). Gleason did not object to Mr. Meyer's victim impact statement to the trial court. *Id.* 15-17. The trial court is permitted to take all of these facts and circumstances under consideration when rendering its decision whether to grant the DOSA request.

Therefore, the trial court did not abuse its discretion when it determined Gleason's case did not warrant the imposition of a DOSA, based in large part because of the residential burglary on Mr. Meyer's home. The trial court was permitted to take into account Mr. Meyer's statements, as they were not objected to, and use those

statements as the basis for its determination to decline Gleason's request for a prison based DOSA. The trial court's ruling on the DOSA should be affirmed.

IV. CONCLUSION

The State concedes that Gleason was improperly sentenced to a consecutive sentence on her Bail Jumping case. The trial court's determination denying Gleason's request for a DOSA was proper and not based on the impermissible consideration of extrajudicial evidence. Therefore, this Court should remand the matter back for resentencing, but without reassignment to a new judge.

RESPECTFULLY submitted this 28th day of March, 2017.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JANET L. GLEASON, Appellant.	No. 49179-6-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 28, 2017, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Peter B. Tiller, attorney for appellant, at the following email addresses: Kelder@tillerlaw.com and Ptiller@tillerlaw.com.

DATED this 28th day of March, 2017, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR
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